In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2040

ULESS GRANT MANSON AND
GEORGE JUNIOR BLAKEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government's use of an employee's tax record prepared by an accountant from information furnished by petitioner Manson in compliance with federal income tax laws violated their Fifth Amendment privilege against self-incrimination, and that the proscriptions of 18 U.S.C. 1955 could not constitutionally reach their wholly intrastate gambling operations.

After a non-jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of conspiracy to conduct and conducting an illegal gambling business in violation of 18 U.S.C. 371 and 1955. Each was sentenced to concurrent terms of three years' imprisonment. All but two months of petitioner Manson's sentence was suspended; he was fined $5,000 on each count. All but one month of petitioner Blakey's sentence

was suspended; he was fined $3,000 on each count. The court of appeals reversed petitioners' convictions on the conspiracy count and affirmed on the substantive count[1] (Pet. App. A; 494 F. 2d 804).

The evidence showed that petitioner Manson owned a variety store in Indianapolis, Indiana, which was being used by him and petitioner Blakey to conduct a gambling operation (Tr. 32-33, 39-40, 107-112, 264, 318, 478, 707-709).[2] The operation had nine employees, including Blakey, who served as manager (Tr. 484). Receipts averaged $5,000 per day (Tr. 482).

One of the employees, Irvin Kelly, furnished a copy of his 1971 federal income tax return and of a W-2 Form. These reflected that Kelly's principal business activity was that of "commission sales,"[3] that Manson was his employer, and that the address of his employer's place of business was Manson's variety store (Pet. App. A 2-3). The tax records had been prepared by an accountant,

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[1]In reversing the convictions on the conspiracy count, the court of appeals stated that the counts were duplicitous because there was no ingredient in the conspiracy count that was not present as well in the completed crime. While the question whether one can be convicted of conspiracy and a substantive violation of 18 U.S.C. 1955 is presently before this Court in *Iannelli* v. *United States*, No. 73-64, certiorari granted, May 28, 1974, in light of the imposition of equal concurrent sentences on the two counts here, we have not sought certiorari to review the Seventh Circuit's reversal of the conspiracy conviction.

[2]We are lodging with the Clerk of this Court the five-volume transcript of trial ("Tr.").

[3]Kelly collected numbers wagers from bettors on the street and was permitted to retain 10% of his collections (Tr. 826-827). His reported "commissions" in 1971 amounted to $10,955 (Tr. 870).

Gerald Smith, from information furnished by petitoner (Tr. 707-709).

1. Petitoners claim that their Fifth Amendment privilege against self-incrimination was violated by the government use of those tax records because petitioner Manson was required by law to make the disclosures contained therein.[4] The scope of the privilege, however, does not extend to information identifying an employer on a federal income tax return. Such data is a necessary incident of a lawful regulatory scheme not directed at an inherently suspect class of individuals. See *California* v. *Byers*, 402 U.S. 424; *Mackey* v. *United States*, 401 U.S. 667, 702-713 (Brennan, J., concurring).

Moreover, the data used by the government were not obtained from petitioners, but were obtained from a government witness. The information was contained in records that had been prepared by Smith, a self-employed accountant, and then sent to witness Kelly. Petitioners cannot invoke the privilege against self-incrimination to prevent the production of witness Kelly's tax records that are in his own possession. "[T]he Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States*, 409 U.S. 322, 328.

Petitioners' reliance upon *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, is misplaced. In *Marchetti* and in *Grosso* this Court held that an individual who failed to comply with the registration

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[4]Although petitioners jointly assert a violation of the Fifth Amendment privilege, it is apparent that Blakey has no standing to raise this issue, since there is no evidence whatsoever connecting him to the federal income tax records in question. *United States* v. *Goodwin*, 470 F. 2d 893, 903 (C.A. 5), certiorari denied, 411 U.S. 969.

requirements of the federal wagering tax laws could invoke the Fifth Amendment privilege as a complete defense against prosecution for such noncompliance. The Court reasoned that the privilege was available because the requirements for registration and payment of the wagering tax would have had the "direct and unmistakable consequence of incriminating petitioner * * *." *Marchetti, supra,* 390 U.S. at 49. Unlike the *Marchetti-Grosso* situation, however, the instant case involves information sought pursuant to an essentially noncriminal regulatory scheme directed at the public at large. See *Shapiro* v. *United States*, 335 U.S. 1, 32-35. Registration and payment ordinarily would not incriminate a taxpayer. "Once the reason for the privilege ceases, the privilege ceases." *Ullmann* v. *United States*, 350 U.S. 422, 439; *California* v. *Byers, supra*; *Mackey* v. *United States, supra.*[5]

2. Petitioners next contend that 18 U.S.C. 1955 cannot constitutionally reach their wholly intrastate operations. The fact that petitioners themselves were not engaged in interstate activities, however, does not preclude federal prosecution. The test for the reach of the federal government's authority over commerce is whether a class of activity affects interstate commerce. "Where the *class of activities* is regulated and that *class* is within the reach of

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[5]*Garner* v. *United States*, cited by petitioner (Pet. 9-10), is an unreported pre-*Couch* opinion, wherein a majority of a panel of the Ninth Circuit held that a taxpayer could successfully invoke the Fifth Amendment privilege to prevent the government from using his income tax returns as evidence against him in a criminal prosecution unrelated to income tax laws, and was affirmed *en banc*, April 11, 1974, petition for a writ of certiorari now pending, No. 74-100. Even assuming *arguendo* its correctness in the face of *California* v. *Byers* and *Mackey*, and its questionable reliance upon *Marchetti*, the *Garner* decision is factually distinguishable from the instant case since we are not here concerned with petitioners' personal returns.

federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. *Maryland* v. *Wirtz*, 392 U.S. 183, 193." *Perez* v. *United States*, 402 U.S. 146, 154.

Prior to enacting 18 U.S.C. 1955 as part of the Organized Crime Control Act of 1970, Congress determined that the gambling activities of which petitioners were a part have a serious impact on interstate commerce. 84 Stat. 922. Accordingly, convictions under Section 1955 do not require a showing in each individual case that the gambling activities of particular defendants affected commerce. *United States* v. *Marrifield*, 496 F. 2d 1278 (C.A. 5); *United States* v. *Hunter*, 478 F. 2d 1019 (C.A. 7), certiorari denied, 414 U.S. 857; *Schneider* v. *United States*, 459 F. 2d 540 (C.A. 8), certiorari denied, 409 U.S. 877.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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